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December 23, 2002

By Hand

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Re: Request for Notices of Intent to Participate
and Written Comments on Scheduling
(67 Fed. Reg. 70093) ("Request For Comments")

Dear Bill:

We write on behalf of America Online, Inc. ("AOL"), Yahoo! Inc. ("Yahoo!"), MusicMatch, Inc. ("MusicMatch"), Listen.com, Inc. ("Listen") (collectively the "Commenting Webcasters") and the Digital Media Association ("DiMA") with some brief additional comments (the "Reply Comments") in reply to the Joint Response To Proposal For Scheduling Of Section 112 and 114 Statutory License Proceedings filed by the RIAA (and others) (the "RIAA Submission"), which was filed in response to the Copyright Office's November 20, 2002 Request for Comments.

INTRODUCTION

The Commenting Webcasters and DiMA file these Reply Comments to the RIAA Submission to address: (i) RIAA's request for a potentially indefinite delay in the scheduling of the nonsubscription services and new subscription services CARP proceedings, (ii) RIAA's meritless comments about interim fees, and (iii) RIAA's position concerning potential consolidation of CARP proceedings. We will not repeat herein the arguments and rationales advanced in the Initial Comments of the Commenting

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Webcasters and DiMA (the "Initial Comments"), wherein the Commenting Webcasters and DiMA asked the Copyright Office:

- (i) to schedule the CARP proceedings for nonsubscription services for the license period 2003-2004 so they commence as soon as possible;
- (ii) to simultaneously initiate the procedural steps necessary to achieve scheduling of a CARP proceeding for new subscription services for the license period 2003-2004 as soon as possible; and
- (iii) in order to achieve efficiencies for the benefit of the Copyright Office and the parties alike, to consolidate forthcoming CARP proceedings for new subscription services and nonsubscription services for the license periods ending December 31, 2004.

The Commenting Webcasters and DiMA are encouraged by the Copyright Office's December 16, 2002 Order indicating the Office's view that all these CARP proceedings "must be commenced in calendar year 2003," based on the principle (with which the Commenting Webcasters and DiMA fully agree) that "royalty rates for a statutory license for a given time period should be established as near to the beginning of the time period as possible." Docket No. 2001-1 CARP DSTRA2 (Dec. 16, 2002 at 1-2) ("December 16th Order").

DISCUSSION

RIAA proposes that the Copyright Office delay scheduling any activities in the 2003-04 nonsubscription services and new subscription services proceedings until after the D.C. Circuit rules on the pending appeals taken in the 1998-2002 nonsubscription services CARP. The problem with this position, of course, is that proceedings would be indefinitely delayed; and the result could well be that the rates for nonsubscription services and new subscription services applicable to the 2003-04 period would not be set until the end of (or after) the statutory license period at issue. For the reasons set forth in the Initial Comments, such a result is untenable, prejudicial and contrary to the principles of the statutory license system – as well as contrary to the Copyright Office's recent December 16, 2002 ruling in the Pre-Existing Services CARP proceeding.

RIAA in its submission expresses its support for such an indefinite delay in the nonsubscription/new subscription services proceedings in part, RIAA says, "assuming" or "predicated on statutory licensees continuing to pay at existing rates subject to retroactive adjustment." RIAA Submission at 2, 7, 13. But the RIAA offers absolutely no statutory or other support for the notion that statutory licensees must pay interim fees; and there is none.

There is nothing in the Copyright Act or other applicable law that provides for any requirement that statutory licensees under 17.U.S.C. §§ 112 or 114 make interim fee payments. The statutory structure, instead, contemplates that for every new statutory license period, there will be a voluntary negotiation period; and that, failing a negotiated resolution, a CARP may be convened to establish the rates for the statutory time period at issue. See 17 U.S.C. § 114 (f)(2)(C)(i)(II).

More specifically, the Copyright Act states that persons wishing to perform sound recordings in a manner consistent with the § 114 statutory license may do so without infringing the rights of sound recording copyright owners if (a) the person complies with the notice requirements prescribed by the Librarian of Congress and pays the royalty fees due or, importantly, (b) "if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined." 17 U.S.C. § 114(f)(4)(B). In other words, where no rate has been set for a particular period, persons may nonetheless perform sound recordings by agreeing to pay the fee that will be set. The House Report accompanying the 1995 Digital Performance Rights in Sound Recordings Act makes the same point: "Entities digitally transmitting sound recordings by means of a qualifying subscription transmission may avoid liability for infringement by paying the royalty fees and complying with the notice requirements, or if rates have not yet been set, agreeing to pay them as they are determined." H.R. Rep. No. 104-274, at 23 (1995) (emphasis added).

The Librarian's decision modifying the CARP Report in the 1998-2002 nonsubscription services proceeding makes clear that the rates set in that proceeding are applicable only for the 1998-2002 time period at issue therein, and not beyond. See 37 C.F.R. § 261.3 (setting rates "[f]or the period October 28, 1998 through December 31, 2002"). Since (absent an immediate voluntary agreement), as of January 1, 2003, no royalty fees will have been determined for the period effective 1/1/03, the Copyright Act is clear that webcasters may perform sound recordings in a manner consistent with the statutory license merely by filing the appropriate notice(s) and agreeing to pay the royalty fees once they are set – without any obligation to pay interim fees (at the rate set for a previous CARP period or any other rate).

Moreover, the provisions concerning at least one other statutory license indicate that when Congress intends to impose an interim fee obligation, it knows how to do so. With respect to the Section 116 statutory license for jukebox performances, Congress provided in Section 803 (concerning institution and conclusion of CARP proceedings) that, where a negotiated license is terminated or expires and is not replaced by another such license agreement, the Librarian shall convene a CARP; and it provided further that the CARP "shall promptly establish an interim royalty rate or rates for jukebox performances." See 17 U.S.C. § 803(a)(4)(B). With respect to Section 114, Congress manifested a decidedly different intent, providing that "the Librarian of Congress shall proceed when and as provided by [§§ 112 and 114]," and not providing

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for an interim fee. See § 803(a)(5). Indeed, the Librarian explicitly has acknowledged that the Copyright Act provides for interim fees only in certain specific circumstances, but not others – noting that the Act in § 115 expressly provides for an ongoing interim fee for physical phonorecords, but does not so provide for digital phonorecord deliveries (where, upon expiration of an existing rate, "there will be a lapse in time when no rates apply to digital phonorecord deliveries"). 61 Fed Reg. 37213, 37214 (July 17, 1996).

Finally, it would be manifestly unfair to require statutory licensees effectively to finance RIAA's costs in any 2003-04 CARP proceedings. The Commenting Webcasters (and DiMA) – like presumably all statutory licensees – would prefer to reach an acceptable voluntary resolution rather than face the substantial costs (and uncertainties) of CARP litigation. Indeed, a significant motivating factor behind any party's decision to enter into a voluntary license is precisely to avoid incurring such costs. If RIAA's "assumption" that it is entitled to receive interim fees were true, the bargaining table contemplated by the statutory structure would be substantially and inequitably altered. Webcasters would have to pay both the costs of litigating and interim fees; whereas RIAA effectively would not have to factor litigation costs into its equation at all, thus reducing its incentive to reach a compromise via negotiation.

In sum, RIAA's position on the interim fee issue is without any support either in law or in fairness.

Finally, we note that the RIAA Submission opposes any consolidation of CARP proceedings; however, it addresses only the subject of a consolidation of all three CARPs in one proceeding. The Commenting Webcasters and DiMA do not suggest any such consolidation; rather, the consolidation contemplated would be only of the nonsubscription services and new subscription services CARPs.

RIAA's own submission acknowledges that the nonsubscription services and subscription services are subject to the same legal standard and that there would be substantial overlap between the parties involved in both proceedings. RIAA Submission at 5. These factors, together with the others discussed in the Initial Comments at 6-8, warrant consolidation of those two proceedings (only) in the interests of efficiency for both the statutory licensees and the Copyright Office (which, as noted in the December 16th Order, "has limited resources for CARP proceedings and cannot conduct too many proceedings at one time"). See December 16th Order at 2.

The reasons discussed by RIAA against consolidation of all three CARPs together (see RIAA Submission at 9-12) are simply irrelevant. RIAA's further comments that consolidated proceedings are by definition "unwieldy" (id. at 10) are misguided. The 1998-2002 CARP was a complicated and prolonged one not as a function of the consolidation of the 1998-2000 and 2001-02 periods; rather, it was a function of the multiplicity of parties and novelty/complexity of issues involved (coupled with document

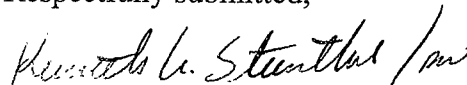
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discovery and production issues beyond the scope of this submission). The point is that it is unassailable that a consolidation limited to the nonsubscription services and new subscription services would yield a huge savings of time and resources for the parties and Copyright Office alike. (Nor would there be any credible basis for RIAA to claim (see id. at 11-12) that such a limited consolidation would effectively deprive RIAA of its choice of counsel or unduly tax the resources of Soundexchange).

CONCLUSION

For the reasons set forth above, the Commenting Webcasters and DiMA respectfully submit that the Copyright Office should: (i) schedule the nonsubscription services CARP proceeding to commence as soon as possible; (ii) initiate the procedural steps required to achieve scheduling of the new subscription services CARP proceeding for the license period 2003-2004 at the earliest possible date; and (iii) consolidate the nonsubscription services CARP for the period 2003-2004 with the new subscription services CARPs for 2001-2002/2003-2004.

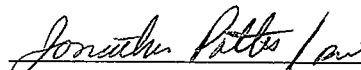
Respectfully submitted,



Kenneth L. Steinthal

(As counsel for
AOL, Yahoo!, MusicMatch and Listen)

- and -



Jonathan Potter

(On Behalf of the Digital Media Association)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing letter has been served this
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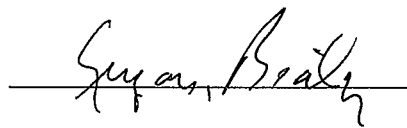
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A handwritten signature in cursive script, reading "Gregory Bailey", is written over a horizontal line.

Gregory Bailey